

CY PRES DOCTRINE IN OHIO

JOHN E. SULLIVAN*

In the field of charitable trusts the courts are confronted with very few construction problems which involve large foundations and the community trusts. The charters of these institutions are generally carefully drafted and contain broad purpose clauses which make them flexible enough to meet the changing time and conditions. Unfortunately the same cannot be said of all charitable trusts.¹ Often charitable donors fail to consider future contingencies with the result that as time passes it becomes either impossible or impractical to carry out the terms of their gift.

The Courts are then confronted with the issue of whether the trust property should be diverted to an analogous charitable undertaking or returned to the donor or the beneficiaries of his estate.² The rule of construction by which many of these charitable gifts are preserved for the public benefit is known as the Cy Pres Doctrine. It would appear that courts in this country today are more willing to apply this doctrine than were courts a century ago.³ It is the purpose of this discussion to consider to what extent the courts of Ohio have accepted and applied this doctrine.

The term Cy Pres is derived from the French expression *cy pres comme possible*—as near as possible.⁴ In the law of trusts it refers to a rule of construction used by Courts of Equity to affectuate the intention of a charitable donor "as near as may be", when it would be impossible or impractical to give literal effect to such intention.⁵ The doctrine existed in the Roman law and was adopted by the English

*Professor, Franklin Law School; B.S., John Carroll University; LL.B., Western Reserve Law School; member of the Ohio Bar.

¹ A foundation is a non-government, non-profit organization having a principal fund of its own and established to maintain or aid social, educational, charitable, or other activities serving the common welfare. ANDREWS, PHILANTHROPIC GIVING 90 (1950). Charitable trusts and foundations generally differ only in legal form. Trusts usually are established by will or inter vivos trust agreement while foundations are usually chartered by the states as non-profit membership corporations, e.g., Ohio Rev. Code §§1702.07, 1719.01, 1719.06; *Suspicion on Charitable Foundations*, Fortune, (Aug. 1947) 108. A community trust is a receptacle into which the combined funds of many donors may be placed for more efficient distribution. Baker, *Community Trusts—A New Look In Charitable Giving*, 26 JOURNAL OF THE STATE BAR OF CALIFORNIA 177 (1951).

² Note, *A Revaluation of Cy Pres*, 49 YALE L. J. 303 (1939).

³ Fisch, *Judicial Attitude Towards Cy Pres*, 25 TEMP. L. Q. 177 (1950). The author attributes the change in attitude to changing social and economic conditions as well as changing philosophies. See Fisch, *American Acceptance of Charitable Trusts*, 28 NOTRE DAME LAW. 219 (1953).

⁴ 2A BOGERT, TRUSTS AND TRUSTEES §431 (1951).

⁵ BLACK, LAW DICTIONARY (4th ed. 1951).

Chancery Courts during the Middle Ages.⁶ The English or common law doctrine was divided into two divisions usually referred to as the judicial cy pres and the prerogative cy pres doctrine.⁷

The prerogative power was exercised by the English chancellors as part of their duties as ministers of the crown. Under English law the crown by virtue of its position as *parens patriae* was privileged to dispose of charitable property as it wished in two situations:

1. Where property was donated for a charitable purpose which was contrary to the law of the land;

2. In a case where the original charity was vaguely defined as to its object and purpose, beneficiary and trustee.⁸

A good example of the former were gifts made to religious societies which were other than the recognized state religion. The latter situation arose when gifts were made "for charity generally" without any provisions for a trustee or reference to any particular charitable purpose.⁹

Judicial Cy Pres was exercised by the Chancellors by virtue of their authority over charitable trusts as equity judges.¹⁰ In 1601 Parliament enacted the Statute of Charitable Uses which recognized certain purposes as charitable and provided for the protection of these trusts in equity.¹¹ However, there is ample authority that before the statute's enactment Courts of Equity had exercised jurisdiction over charitable trusts.¹²

The judicial Cy Pres Doctrine is the practice of equity judges wherein they direct property which has been given to a charitable purpose to another similar purpose in those cases where it has become impossible, impractical or inexpedient to carry out the original purpose and the donor has evinced a general charitable intent.¹³

This arbitrary prerogative doctrine was considered contrary to the American concept of the constitutional guarantee of separation of powers

⁶ ZOLLMANN, CHARITIES §117, §118 (1924).

⁷ 2A Bogert, *op. cit. supra* note 4, §432; Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 377 (1953).

⁸ 4 SCOTT, TRUSTS §399.1 (2nd ed. 1956); Note, *Charitable Trusts—Definitions and History—Purposes—Beneficiaries—Cy Pres Doctrine*, 9 ST. JOHNS L. REV. 114, 120 (1934).

⁹ 4 SCOTT, *op. cit. supra* note 8, §399.1; ZOLLMAN, *op. cit. supra* note 6, §121.

¹⁰ 4 SCOTT, *op. cit. supra* note 8, §399.1; 2A BOGERT, *op. cit. supra* note 4, §432; ZOLLMAN, *op. cit. supra* note 6, §123.

¹¹ 43 ELIZ. 1, C. 4 (1601); 4 SCOTT, *op. cit. supra* note 8, §348.2.

¹² *Ibid.*

¹³ 4 SCOTT, *op. cit. supra* note 8, §399.2; ZOLLMAN *op. cit. supra* note 6, §123. One of the most frequent statements of the doctrine will be found in RESTATEMENT, TRUSTS, §399 (1935). If property is given in trust to be applied to a particular charitable purpose and it is or becomes impossible or impractical or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

between the executive, legislative and judicial branches as well as the American reverence for private property rights.¹⁴ As a result, with certain qualifications, the prerogative Cy Pres Doctrine was never recognized in Ohio¹⁵ or other American courts.¹⁶ In fact, it was the failure on the part of many courts in the United States to grasp the distinction between the prerogative and judicial function which delayed our acknowledgment of the intrinsic worth of the entire Cy Pres Doctrine.¹⁷

Today the judicial Cy Pres Doctrine is in force in most American jurisdictions but there is a lack of uniformity as to the extent to which it is applied. In most of the states the doctrine has been affirmed by judicial decision but in some states the doctrine has been legalized by the legislatures.¹⁸

One of the earliest cases recognizing the existence of the doctrine by the Supreme Court of Ohio was in 1835 in *Le Clercq v. Town of Gallipolis*.¹⁹ Land was set aside by the original settlers as a public square in the town of Gallipolis. Many years later the legislature passed a law which permitted the town officials to lease the land and use the proceeds for river front improvement. Certain citizens who owned lots adjoining the square sought an injunction to prevent the property from being converted to any other than a public use. The Court granted a perpetual injunction but speaking of property donated for public purposes said:

Where circumstances are so changed, that the direction of the donor prescribing the use, cannot be literally carried into effect, the legislature or the court, in those cases where general intention can be effected, may lawfully, in some cases, enforce its execution as nearly as circumstances admit, by the application of the Doctrine of Cy Pres.²⁰

Four years later in 1839 the Supreme Court decided the first of the celebrated McIntire cases.²¹ John McIntire, an original settler of

¹⁴ Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 379-385 (1953).

¹⁵ Hunt v. Edgerton, 9 Ohio C.C.R. (n.s.) 353, 19 Ohio C.C. Dec. 377, *aff'd. without opinion*, 75 Ohio St. 594, 80 N.E. 1126 (1906); Rea v. Griffin, 21 Ohio N.P. (n.s.) 129, 29 Ohio Dec. (n.s.) 174, *aff'd.*, Rogers v. Rea, 98 Ohio St. 315, 120 N.E. 828 (1918).

¹⁶ 4 SCOTT, *op. cit. supra* note 8, §399.1; ZOLLMAN, *op. cit. supra* note 6, §122; Annot. 163 A.L.R. 784, 813. One of the qualifications is that there are some statements in the cases to the effect that the various state legislatures have succeeded to this power. Another qualification is that in America, courts have consistently sustained gifts to charity or for the poor where there is no mention of a trustee. 2A BOGERT, *op. cit. supra* note 4, §434.

¹⁷ 2A BOGERT, *op. cit. supra* note 4, §433; Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 380; Annot., 163 A.L.R. 784, 813.

¹⁸ 4 SCOTT, *op. cit. supra* note 8, §399.2.

¹⁹ 7 Ohio 218, 28 Am. Dec. 641 (1835).

²⁰ 7 Ohio 218, 221, 28 Am. Dec. 641, 643.

²¹ Trustees of McIntire Poor School v. Zanesville Canal & Mfg. Co., 9 Ohio 203, 34 Am. Dec. 436 (1839).

the town of Zanesville, had by his will directed that upon the fulfillment of certain conditions the greater part of his estate should be invested in the stock of the Zanesville Canal and Manufacturing Co. and that the income should be used for the establishment and support of a school for the children of the poor of the town. The will provided that the president and directors of the Zanesville Canal and Manufacturing Co. should act as trustees for the carrying out of the terms of this trust. This company had a franchise to construct a dam lock and canal.

The company failed to complete the project in the time allotted by law and the state legislature passed an act authorizing a purchase of the company's property by the proper state authorities. Another act was also passed reciting that since the Zanesville company had ceased to exist and no one was capable of executing McIntire's trust a corporation of five trustees should be created to accomplish the wish of the testator. The new board of trustees filed a bill in equity against the executors of the estate, the heirs of McIntire who claimed the bequest was void and the Zanesville company.

The court was faced with two issues—whether the will of McIntire created a valid charitable trust and whether the new trustees appointed by the act of the legislature were the proper parties to execute it. The Court held that the bequest created a valid charitable trust but that the original trustees were the proper parties to execute it because The Zanesville Co. still had a legal existence and that the appointment of the new trustees was void with the result that the Zanesville Co. still had the right, through its officers, to carry out the terms of the gift.

The scope of the doctrine of *Cy Pres* was argued at great length by counsel in the case but as the court sustained the original trust, it did not expressly mention *Cy Pres* in its opinion. The importance of this decision was that it established that equity courts in Ohio had jurisdiction over charitable trusts by reason of the court's inherent authority which is independent of the statute of charitable uses or any prerogative power of the state.²²

The same liberal attitude toward the interpretation of charitable bequests was shown by the court in 1851 in the second McIntire case²³ where the Supreme Court held that the benefits of this trust were not limited to the children of the poor residing in the corporate limits of the town as they existed at the death of McIntire but also included poor children residing in the territory which had been added to the town since

²² 9 Ohio 287, 34 Am. Dec. 438 (1839). But without reference to these considerations, where a trust is plainly defined, and a trustee exists, capable of holding the property and executing the trust, it has never been doubted that chancery has jurisdiction over it, by its own inherent authority; not derived by the statute, nor resulting from its functions as *parens patriae* accord. *Urmeys' Ex'rs v. Levi Wooden*, 1 Ohio St. 160, 59 Am. Dec. 615 (1853); *Palmer v. Oiler*, 102 Ohio St. 271, 131 N.E. 362 (1921).

²³ *The Zanesville Canal & Manufacturing Co. v. City of Zanesville*, 20 Ohio 483 (1851).

his death. By this decision the court believed it was carrying out the real intention of the testator, because most of the poor, unlike the modern suburbia at that time, lived in the circumference area of the expanded city. To hold otherwise, it was felt, would defeat his purpose. The court did not expressly mention Cy Pres but certainly they were effecting a more efficient distribution of his funds in light of changing circumstances.

The last case involving the McIntire fund reached the Supreme Court in 1867.²⁴ The court reaffirmed the principle of the previous case but was also faced with two new issues. The stock of the Zanesville Co., which was now defunct, could not be purchased and, if it were obtained, it was valueless. Therefore, it was argued successfully by the trustees that it was both impossible and impractical to invest the fund in this stock. The court directed them to invest the funds in other safe and productive channels. Since this related to the administration of trust funds rather than altering the purpose it could hardly be based on the Cy Pres Doctrine.

The other issue presented by the passing of time was that after the death of McIntire the State inaugurated a system of public schools which were supported by general taxation and in which the children of rich as well as the poor were given a free education. This had created a certain repugnance on the part of parents and children toward a distinctive "Poor School." The trustees had turned the McIntire School building over to the local school board and were paying expenses of this school as well as another school in the city. There were still many children in the city of indigent parents who did not avail themselves of the public schools because they could not afford proper clothing, books and school items. The trustees had a surplus and asked directions for its application.

The court found that the general intention of McIntire was the education of the poor children of Zanesville. It held that the establishment and maintenance of a school was a mere means to that end and this means having become impractical, the trustees might resort to other means to effect the general intention of the testator. In this new *modus operandi* it included books, clothing and even food as well as higher education. However, it did not include the use of the fund to aid the public school system because this would benefit both rich and poor children, and would merely have the effect of lightening the tax burden.

Although the court did not mention Cy Pres by name, it was clearly referring to it when speaking of the changed condition it said:

Is the object of the charity exhausted and must the fund be paid over to the heirs of the donor? We think not. We must look deeper than the mere words of this donation and through them see its spirit. We must inquire what the donor himself would now direct, had he lived to witness the present altered circumstances of the case.²⁵

²⁴ McIntire's Adm'r and the Zanesville Canal & Manufacturing Co. v. City of Zanesville, 17 Ohio St. 352 (1867).

²⁵ *Id.* at 363.

However, the next year the court with the same membership held that the doctrine of Cy Pres did not apply in the case of the *Board of Education of the Incorporated Village of Van Wert v. Inhabitants of the Town of Van Wert*.²⁶ Two specific lots in the city of Van Wert were dedicated by the original proprietors "for school purposes on which to erect school houses." With the passing of time the two lots became unsuitable for such purposes because of their close proximity to a railroad. The school authorities sought to sell the lots and apply the proceeds for the purchase of new sites. They claimed that by an applicable state school statute they were authorized to sell the real estate. The court held that the statute only applied to cases where the absolute ownership of the school property was vested in the public authorities and did not apply to a case where the original proprietors dedicated particular lots for a specific use.²⁷ Cy Pres was held inapplicable in such a case and the property was held to revert to the heirs of the dedicators. The opinion cited *Le Clercq v. Town of Gallipolis* with approval.

By 1924 the three McIntire cases, *The Board of Education of the Incorporated Village of Van Wert v. Inhabitants of the Town of Van Wert*, and *Le Clercq v. Town of Gallipolis* were the important Supreme Court authority in Ohio for the existence of the Doctrine.²⁸ The McIntire cases did not mention it by name and the latter two held that it was inapplicable to the solution of the particular cases. However, during the years and especially after the turn of the century the Doctrine was referred to and in certain instances applied by lower courts in the state.²⁹

An important decision in this field of law was *Gerhart v. Richardson* in 1924.³⁰ A testator had left his farm house in trust as a home for the aged and destitute of his township. Sufficient funds were not provided with which to operate the home. Although again the Doctrine unfortunately was not mentioned by name, the court in executing what they considered the general charitable intention of the testator permitted

²⁶ 18 Ohio St. 221, 98 Am. Dec. 114 (1868).

²⁷ The case was subsequently overruled by the case of *Babin v. City of Ashland*, 160 Ohio St. 328, 116 N.E. 2d 580 (1953) in so far as the case attempted to limit local authorities on the selling of land conveyed in fee for a specific use on the cessation of such use.

²⁸ Deibel, *Supreme Court Discards Cy Pres Doctrine*, 20 Ohio L. Rep. 237 (1923); Patterson, *Dirlam v. Morrow Was Rightly Decided*, 20 Ohio L. Rep. 321, 328 (1923).

²⁹ *Graham v. Bergin*, 18 Ohio App. 35 (1923); *Proctor v. Mathers*, 17 Ohio App. 118, 21 Ohio L. Rep. 492 (1922); *Rockwell v. Blaney*, 9 Ohio N. P. (n.s.) 495, 498, 22 Ohio Dec. 107, 110 (1910); *First German Reformed Church v. Weikel*, 7 Ohio N.P. (n.s.) 377, 19 Ohio Dec. 239 (1908); *Harper v. Central Trust Co.*, 8 Ohio N. P. 157, 11 Ohio Dec. 240 (1901). See *City of Cincinnati v. McMicken*, 6 Ohio C.C.R. 188, 3 Ohio C.C. Dec. 409, *affirmed without opinion*, 29 Ohio Weekly Law Bulletin 168 (1892).

³⁰ 109 Ohio St. 418, 142 N.E. 890 (1924).

the trustees to rent the farm and apply the proceeds to the aged and poor. It is unfortunate here as well as in the McIntire cases that the court did not see fit to mention Cy Pres because they thereby opened the door to the confusion which was later to come between the Doctrine of Cy Pres and the Doctrine of Deviation.

For some unknown reason very few Cy Pres cases reach the Supreme Court and therefore most statements of the doctrine have appeared in lower court opinions. Ohio courts seem to follow the traditional view that before the Cy Pres Doctrine will be applied by a court these three essentials must be present:³¹ (1) There must be a valid charitable trust and one that is invalid will not be cured by an application of the Doctrine;³² (2) It must be established that it is impossible or impractical to carry out the specific purpose of the trust; (3) It must be established that the donor evinced a general charitable intent.³³

In meeting the first requisite charitable trusts are aided by the principle that the courts of this state are committed to a liberal interpretation of such trust instruments.³⁴ In the above-mentioned McIntire cases Ohio has enforced charitable bequests for educational institutions. Other Ohio decisions have sustained such charitable purposes as the case of orphans,³⁵ the religious advancement of the living,³⁶ the appropriation of land for the burial of the dead³⁷ and gifts which seek to relieve poverty and destitution.³⁸

It is of the nature of a charitable trust that the beneficiaries must be of a large and sufficiently indefinite class because it is axiomatic that the law does not consider gifts to particular individuals as charitable.³⁹

³¹ RESTATEMENT, TRUSTS, §399 (1935).

³² *Dirlam Executor v. Morrow*, 102 Ohio St. 279, 131 N.E. 365 (1921) discussed below. See *Collings v. Davis*, 17 Ohio C.C.R. (n.s.) 221, 24 Ohio C.C. Dec. 84 (1911). Deibel, *supra* note 28, at 244. 2A BOGERT, TRUST AND TRUSTEES, §431 (1951).

³³ *McIntire's Adm'r and The Zanesville Canal & Manufacturing Co. v. City of Zanesville*, 17 Ohio St. 352 (1867) discussed previously. *Craft v. Shroyer*, 81 Ohio App. 253, 74 N.E. 2d 589 (1947); *Heinlein v. Elyria Savings & Trust Co.*, 75 Ohio App. 353, 62 N.E. 2d 284 (1945); *Allen Adm'r. v. City of Bellefontaine*, 47 Ohio App. 359, 191 N.E. 896 (1934); *Ward v. Worthington*, 28 Ohio App. 325, 162 N.E. 714 (1928); *Murr v. Youse*, 52 Ohio L. Abs. 321, 80 N.E. 2d 788 (1946) all discussed below.

³⁴ *Gearheart v. Richardson*, 109 Ohio St. 418, 142 N.E. 890 (1924); *Palmer v. Oiler*, 102 Ohio St. 271, 131 N.E. 362 (1921); *Sowers v. Cyrenius*, 39 Ohio St. 29, 48 Am. Rep. 48 (1883); *Urmeys Executors v. Wooden*, 1 Ohio St. 160, 59 Am. Dec. 615 (1853); 9 Ohio Jur. 2d *Charities* §44 (1954).

³⁵ *Urmeys Exrs. v. Wooden*, 1 Ohio St. 160, 59 Am. Dec. 615 (1853).

³⁶ *Williams v. Society of Cincinnati*, 1 Ohio St. 478 (1852); *Miller v. Teachout*, 24 Ohio St. 525 (1874); *Sowers v. Cyrenius*, 39 Ohio St. 29, 48 Am. Rep. 418 (1883).

³⁷ *Hullman v. Honcomp*, 5 Ohio St. 238 (1855).

³⁸ *Gearhart v. Richardson*, 109 Ohio St. 418, 142 N.E. 890 (1924).

³⁹ *In Re Estate of Salisbury*, 90 Ohio App. 17, 101 N.E. 2d 304 (1951); See *Eagan v. Commissioner of Internal Revenue*, 43 F. 2d 881 (5th Cir. 1930).

As a result charitable trusts by their nature must contain a certain degree of vagueness while at the same time they must be sufficiently definite as to their purposes and beneficiaries so that a court is able to enforce their terms.

Whether a particular trust meets such almost contradictory tests depends upon the peculiar facts of each individual case.⁴⁰ In *Palmer v. Oiler*⁴¹ the Supreme Court upheld as valid a residuary clause of a will which provided: "The residue of my estate I give to the Cleveland Trust Company to be devoted to the needy and poor women." But on the very same day in the case of *Dirlam Ex'r. v. Morrow*⁴² the court in a per curiam opinion with one judge dissenting held the following residuary clause invalid as too vaguely defined:

To the First Congregational Church of Mansfield, Ohio and the Mayflower Memorial Congregational Church of Mansfield, Ohio, as residuary legatees of my estate I bequeath the remainder of my estate and all my real estate . . . the income to be used for religious and philanthropic work in Mansfield, Ohio, especially among children and young people promoting among them Christian living the fruit of the spirit as shown in Galatians, Chap. 5, Verse 22, total abstinence from strong drink and tobacco in all forms, rules of health, thrift and economy.

The clause then contained a complicated procedure for the selection of the trustees of the fund and a separate clause gave certain of the testatrix's relatives a right of homestead in the real property devised. The court stated that this latter provision accentuated the illegality of the bequest.

However, other Ohio cases have sustained mixed gifts for private and charitable purposes.⁴³ A Court of Appeals stated that the fusion of a charitable trust with a trust of a private nature does not render the charitable trust invalid as long as the two gifts are separable and that in *Dirlam Ex'r. v. Morrow* the court was simply dealing with an invalid trust.⁴⁴

The court in the *Morrow* case did not discuss the application of the Cy Pres Doctrine apparently in keeping with the rule that Cy Pres cannot be used to cure an invalid charitable trust.

Yet it is difficult to reconcile the *Morrow* case with *Palmer v. Oiler* on the issue of uncertainty and other Ohio cases have sustained charitable gifts almost as vague.⁴⁵ It would seem that the testatrix here

⁴⁰ *Edgeter v. Kemper*, 73 Ohio L. Abs. 297, 305 (1955).

⁴¹ 102 Ohio St. 271, 131 N.E. 362 (1921).

⁴² 102 Ohio St. 279, 131 N.E. 365 (1921).

⁴³ *Miller v. Teachout*, 24 Ohio St. 525 (1874); *Graham v. Bergin*, 18 Ohio App. 35 (1923).

⁴⁴ 18 Ohio App. 35, 41 (1923).

⁴⁵ *Sowers v. Cyrenius*, 39 Ohio 29, 48 Am. Rep. 418 (1883); *Miller v. Teachout*, 24 Ohio St. 525 (1874); *Urmeys Executors v. Wooden*, 1 Ohio St. 160,

had a general charitable intent, namely to aid in the spiritual and moral development of young people in Mansfield and though the method of thus achieving this end was faulty it would appear that the court would not have been extending the law of Ohio if they had sustained the gift and then applied the Cy Pres Doctrine.⁴⁶

In regard to the second requirement for the application of the doctrine, that it is impractical or impossible to carry out the specific purpose of the donor, Ohio law is not clear. One noted authority states that Cy Pres should be applicable where it is impractical to carry out the terms of the trust even though it is possible to do so.⁴⁷ This was the view followed by a lower court in the case of *Harper v. Central Trust Co.*⁴⁸ Several citizens contributed to a trust fund providing for the support of a mother of a National Guardsman killed while involved in riot duty, and also for the support of dependent relatives of any member "who might lose his life in the performance of assigned military duties." Seventeen years passed without a similar occurrence. The court in applying the Cy Pres Doctrine and allowing the funds to be used for the benefit of three guardsmen injured in the same riot admitted that the object of the trust had not entirely failed. It was held that it was still possible that in the future some member might lose his life on assigned military duty. But the court said:

Neither is it necessary that the object of the trust should cease to exist, or that the expressed trust should become absolutely impossible of application before the Doctrine of Cy Pres can be invoked.

The best considered English authorities seem to hold that it is sufficient if it is highly improbable that the circumstances will arise calling for the application of the trust, and that the question of probability is one appealing largely to the judgment and discretion of the chancellor.⁴⁹

However a more conservative approach to the extent of judicial discretion on the issue of impracticality was displayed by another Ohio court in *Heinlein v. Elyria Savings & Trust Co.*⁵⁰ In holding that funds which were willed by a testator for the establishment of two public parks on designated sites could not be used for the maintenance of another older park and quoting 10 AM. JUR., *Charities*, §124 with approval, it stated:

. . . There can be no question of Cy Pres until it is clearly established that the directions of the testator cannot be carried into effect. Therefore, a court of equity is not entitled to substitute a different scheme for the scheme which the donor

59 Am. Dec. 615 (1853). A collection of such cases will be found in the Ohio Annotations to the RESTATEMENT, TRUSTS, §364 (1939).

⁴⁶ Deibel, *op. cit. supra* note 28.

⁴⁷ 4 SCOTT, TRUSTS, §399.4 (2nd ed. 1956).

⁴⁸ 8 Ohio N. P. 157, 11 Ohio Dec. 240 (1901).

⁴⁹ 8 Ohio N. P. 157, 159, 11 Ohio Dec. 240, 243 (1901).

⁵⁰ 75 Ohio App. 353, 62 N.E. 2d 284 (1945).

has prescribed in the instrument which creates the charity, merely because a coldly wise intelligence, impervious to the special predilections which inspired his liberality and untrammelled by his directions, would have dictated a different use of his money.⁵¹

A survey of Ohio decisions would show that the specific purpose of a donor may fail for many reasons: the fund may be excessive⁵² or insufficient⁵³ for the particular purpose; the particular purpose may already have been accomplished at the time the gift is to take effect;⁵⁴ the charity that is to receive the gift ceases to exist or never existed;⁵⁵ the property donated is unsuitable for the purpose which it is given;⁵⁶ the gift is subject to a condition precedent requiring action of a third party who fails to act.⁵⁷

With the exception of one case which involved the distribution of excessive funds⁵⁸ and a federal court case⁵⁹ wherein the court refused to apply Cy Pres to an Ohio charitable trust where the impossibility of the donor's purpose occurred as a result of the action of the trustees themselves, whether a Ohio court will apply Cy Pres in one of the above situations depends on whether the donor gave evidence of a general charitable intention.

This third requirement for the application of the Doctrine is subject to much criticism. In meeting this requirement courts seek to determine whether a donor intended that his property was to be applied to charity in any event or only if such application could be applied in the particular manner specified in his trust instrument. The general charitable intention concept is based on the idea that in applying Cy Pres a

⁵¹ 75 Ohio App. 353, 363, 62 N.E. 2d 284, 289 (1945).

⁵² A case involving excessive funds where Cy Pres has been applied: *First German Reformed Church v. Weikel*, 7 Ohio N.P. (n.s.) 377, 19 Ohio Dec. 239 (1908). *Contra*, *Collings v. Davis*, 17 Ohio C.C.R. (n.s.) 221, 24 Ohio C.C. Dec. 84 (1911), *aff'd. without opinion*, 87 Ohio St. 504 (1912).

⁵³ *Gearhart v. Richardson*, 109 Ohio St. 418, 142 N.E. 890 (1924); *Graham v. Bergin*, 18 Ohio App. 35 (1923); *Allen v. City of Bellefontaine*, 47 Ohio App. 359, 191 N.E. 896 (1934).

⁵⁴ *In Matter of Distribution of Y.M.C.A. War Fund*, 63 Ohio App. 213, 25 N.E. 2d 956 (1939); *Niles Post No. 2074 of the Veterans of Foreign Wars v. Niles Memorial Hospital Assn.*, 65 Ohio App. 238, 29 N.E. 2d 631 (1936); *Procter v. Mathers*, 17 Ohio App. 118, 21 Ohio L. Rep. 492 (1922); *Hall v. Asbaugh*, 4 Ohio L. Abs. 70 (1925); *Murr v. Youse*, 52 Ohio L. Abs. 321, 80 N.E. 2d 788 (1946).

⁵⁵ *Ward v. Worthington*, 28 Ohio App. 325, 162 N.E. 714 (1928); *Bowen Adm'r. v. Kollar*, 18 Ohio App. 10, 1 Ohio L. Abs. 470 (1923); *Rockwell v. Blaney*, 9 Ohio N. P. (n.s.) 495, 22 Ohio Dec. 107 (1910).

⁵⁶ *Board of Education of Incorporated Village of Van Wert v. Inhabitants of Town of Van Wert*, 18 Ohio St. 221, 98 Am. Dec. 114 (1868); *Cincinnati v. McMicken*, 6 Ohio C.C.R. 188, 3 Ohio C.C. Dec. 409, *aff'd. without opinion*, 29 Ohio Weekly Law Bulletin 168 (1892).

⁵⁷ *Allen v. City of Bellefontaine*, 47 Ohio App. 359, 191 N.E. 896 (1934).

⁵⁸ *Collings v. Davis*, 17 Ohio C.C.R. (n.s.) 221, 24 Ohio C.C. Dec. 84, *aff'd. without opinion*, 87 Ohio St. 504 (1911).

⁵⁹ *Harvard College v. Jewett*, 11 F. 2d 119 (6th Cir. 1925).

court is really carrying out a secondary intent of the donor. As one authority points out most donors probably never considered that their plans might fail and courts are really applying or refusing to apply the doctrine based upon their own subjective viewpoint as to the social utility of the particular gift.⁶⁰

In the *City of Cincinnati v. McMicken*,⁶¹ a testator bequeathed real estate in the City of Cincinnati for the establishment of what is now the University of Cincinnati. Changing times made the particular site unsuitable for a University. The court in permitting the removal of the University to another location found that the general intention of the testator was the establishment of such an institution and that he did not make his gift dependent upon the particular site. The court indicated that what it was really attempting was to carry out a secondary intention of the testator.

There is one type of charitable trust where Ohio courts, with one exception,⁶² apparently always have found that there was a charitable intent on the part of the donor. Every one of these cases arose concerning funds which were raised by popular subscriptions during the first World War for the relief of servicemen. As far as such funds are concerned the court could hardly in most cases require that the money be returned to the original donors because the donors are often too numerous and in most cases are unknown.⁶³ The courts might have held that this property should escheat to the State on the cessation of hostilities but no case has so held.⁶⁴ In most of these cases the funds were either turned over to local veterans organizations or to trustees appointed by the courts to construct war memorials or to assist in the work of veterans' rehabilitation.

In some cases courts have considered conditions at the time of the making of the will as well as the specific language which was used in arriving at the decision that the testator evinced a narrow charitable intention: In *Bowen, Adm'r. v. Kollar*,⁶⁵ a testator left funds to the "Old Folks Home" for men in Kansas City. There was no such in-

⁶⁰ 2A BOGERT, TRUSTS AND TRUSTEES, §436 (1951).

⁶¹ 6 Ohio C.C.R. 188, 3 Ohio C.C. Dec. 409, *aff'd. without opinion*, 29 Ohio Weekly Law Bulletin 168 (1892). Compare BOGERT, *op. cit. supra* note 60, §436; Carr v. Lane Seminary, 5 Ohio Op. 272, 21 Ohio L. Abs. 107, *aff'd.*, 5 Ohio Op. 283, *mod. on rehearing*, 5 Ohio Op. 283 (1936).

⁶² American Legion v. Hospital Assn., 11 Ohio L. Abs. 133 (1931) a case where the donors were known and they were asked whether they wished their donations returned or not.

⁶³ In Matter of Distribution of Y.M.C.A. War Fund, 63 Ohio App. 213, 25 N.E. 2d 956 (1939); Niles Post No. 2074 of the Veterans of Foreign Wars v. Niles Memorial Hospital Assn., 65 Ohio App. 238, 29 N.E. 2d 631 (1936); Procter v. Mathers, 17 Ohio App. 118, 21 Ohio L. Rep. 492 (1922); Hall v. Asbaugh, 4 Ohio L. Abs. 70 (1925).

⁶⁴ Comment, *Cy Pres Doctrine and Anonymous Donors*, 6 STAN. L. REV. 729 (1954).

⁶⁵ 18 Ohio App. 10, 1 Ohio L. Abs. 470 (1923).

stitution exclusively for men in existence in that city either at the time of the execution of the will or the death of the testator. The court refused to find an intention to aid the aged in general and pointed out that an unhappy marriage in the testator's life probably influenced the testator's language in limiting his gift to men. Similarly in *Allen Adm'r. v. Bellefontaine*⁶⁶ a testatrix left funds for the establishment of a private lying-in hospital and research center to be used by local physicians who were to supply additional funds to the trust. Literal execution of this trust was impossible. The court held that there was no intention to aid the sick in general and funds could not be applied to aid another hospital. The court calls attention to the fact that the testatrix knew of the other hospital at the time of the execution of her will and it appeared she intended to establish a different type of institution.

In two other cases specific language used in the will also influenced courts in finding that the testator's intent was narrow. In *Murr v. Youse*⁶⁷ a testator left a fund for the erection of a library building which was to bear his name. At the time the gift was to be executed the town had adequate library facilities. The court found that it would be impractical to carry out the testator's gift but refused to apply Cy Pres to the funds because of a lack of a general charitable intent. His purpose according to the court was to have a library building erected on a designated site which was to bear his name and not to aid library work in general. In *Ward v. Worthington*⁶⁸ a testatrix gave her home to a church to be used as a parsonage. The will provided that portraits of certain of her relatives should remain in the residence. At the time of her death the church was no longer in existence and the testatrix's title in the home was only an undivided half interest. The residence was sold and the court again refused to apply Cy Pres to her half of the proceeds because of the lack of a general charitable intent. The provision as to the portraits helped the court to reach this conclusion.

A survey of Ohio decision reveals that in recent years Ohio courts are attempting to circumvent this third requirement by applying what is known as the Doctrine of Deviation. This doctrine is often justifiably confused with the Doctrine of Cy Pres. The chief difference is that the former doctrine applies in the field of private as well as charitable trusts and it is important to note that under it a court is not required to find a general charitable intent.⁶⁹ In ordering a deviation the court does not touch the purpose or object of the trust but merely permits a deviation from the terms of the trust in matters which relate to its administration.⁷⁰

In the *First National Bank of Akron v. The Unknown Heirs of*

⁶⁶ 47 Ohio App. 359, 191 N.E. 896 (1934).

⁶⁷ 52 Ohio L. Abs. 321, 80 N.E. 2d 788 (1946).

⁶⁸ 28 Ohio App. 325, 162 N.E. 714 (1928).

⁶⁹ *Craft, Ex'r. v. Shroyer*, 81 Ohio App. 253, 273, 74 N.E. 2d 589, 598 (1947).

⁷⁰ 4 SCOTT, TRUSTS §399 (2nd ed. 1956).

*Donnelly*⁷¹ the testator authorized his trustee to use the trust funds for the support of a Catholic Orphanage in Summit County and if there were none to establish this type of institution. Summit County did not have a Catholic orphanage and the trust funds were insufficient to establish one. The court ordered the trustees to use the funds for the care and support of Summit County orphans in the nearby Catholic orphanage of Cuyahoga County. The court stated that it did not decide whether the doctrine of Cy Pres would apply but suggested that part of the confusion that exists between the two concepts is that in certain cases both rules could be applied.

Similarly in *Craft Ex'r. v. Shoyer*⁷² a testatrix left her entire estate to establish an orphanage for full orphans of the United Lutheran Church of Miami County, Ohio. It was admitted that it was impractical and inexpedient to carry out the specific terms of the trust. The court refused to find a general intention to aid orphans here because of the specific language of the will but they ordered the trustees to use the funds for the care, maintenance and support of Miami County orphans during their residence at a neighboring United Lutheran Orphanage in Springfield.

In another recent case the Common Pleas Court of Cuyahoga County permitted the income from certain trust funds that had been created for the support of the Cleveland Art Museum to be used for a limited time to help construct the physical plant of the Museum.⁷³

From the results which are sought to be achieved by the decrees in these three cases it would be hard indeed to distinguish the Doctrine of Deviation from Cy Pres. In *Findley v. The City of Conneaut*⁷⁴ the Ohio Supreme Court placed a limitation on both the Doctrine of Cy Pres and the Doctrine of Deviation. A testator devised the residue of his estate to a trustee for the purpose of establishing an industrial school in Conneaut, Ohio if that city accepted certain conditions of the testator. Conneaut did not accept the offer. The will provided in that event that the same offer was to be made to the Village of Geneva. If neither municipality accepted the offer or met the conditions of the testator the trustee was to establish the school himself or give the money to an established school. In a declaratory judgment action brought by the trustee to determine the rights of the parties the Village of Geneva sought relief from one of the conditions, viz., that the accepting community provide a maintenance fund for the school which would yield five thousand dollars a year. Geneva argued that since the trust funds had increased from two hundred and fifty thousand dollars to almost nine hundred thousand dollars they should be relieved of this requirement and that the extra money now in the fund be used for this purpose. The Court refused

⁷¹ 96 Ohio App. 509, 122 N.E. 2d 672 (1954).

⁷² 81 Ohio App. 253, 74 N.E. 2d 589 (1947).

⁷³ *Cleveland Museum of Art v. O'Neill*, 57 Ohio Op. 250 (1955).

⁷⁴ 145 Ohio St. 480, 62 N.E. 2d 318 (1945).

to apply the Doctrine of Deviation to relieve Geneva of this requirement. The Court said that deviation is used only to prevent the failure of the purpose of a charitable trust. But here the testator had provided for alternative plans under either of which his purposes could be accomplished. The court stated that neither Cy Pres nor deviation is applied to cases where a testator has provided alternate plans to carry out the purposes of his trust and one of them is legal and possible.⁷⁵

This rule should supply the key to the drafters of charitable trusts. If a client wishes to establish a charitable trust, the attorney should frankly inform him of the possibility that changing times and conditions may render his particular purpose impracticable or impossible of accomplishment. If his client in this event wishes the property to revert to him or his successors the instrument should so state but if the client wishes the property to be perpetually devoted to charitable uses there are two possibilities open to the attorney.

The trust instrument may contain a provision whereby if the original plan fails the trustee is permitted to modify the trust or apply the income to new charitable needs. In this manner court action to modify the trust is eliminated. If this provision is not inserted court action will be necessary because Cy Pres is a power of equity courts alone.⁷⁶

Probably the best suggestion in many of the cases is for the attorney to call to the client's attention the feasibility of leaving the funds in the hands of his local community foundation. These institutions administer many separate charitable funds which may meet the donor's purpose and they also give their trustees wide powers to meet changing times and conditions. In fact it has been the hesitancy of many courts to apply Cy Pres that has contributed to the growth of these organizations.⁷⁷

CONCLUSION

Ohio has adopted the general principles of the Cy Pres Doctrine. Most of the cases where the court refers to the doctrine are lower court decisions. In this state the Doctrine is of judicial origin as the prerogative power has never been recognized. Before the doctrine is applied the court must establish that a charitable trust is involved. The purpose of the trust must be impractical or impossible and the testator must have evinced a general charitable intent. The latter requirement is avoided in some recent cases by the application by the courts of an analogous theory from the field of private trusts which is known as the Doctrine of Deviation. Most of the problems in this area can be avoided by the attorney who ascertains the real objectives of his client and clearly so states the intention of his client in the trust instrument.

⁷⁵ For additional litigation in this matter see *Kingdom v. Record*, 72 Ohio L. Abs. 249, 133 N.E. 2d 921 (1954).

⁷⁶ 2A BOGERT, *op. cit. supra* note 60, §435.

⁷⁷ LOMIS, *COMMUNITY TRUSTS OF AMERICA*, 1914-1951, 51 et seq. (1950); Baker, *Community Trusts*, 26 JOURNAL OF THE STATE BAR OF CALIFORNIA 177, 179; Report for 1951, The New York Community Trust p. 1-6.